Corn Brothers, Inc. *and* Randy A. Whitten *and* Retail, Wholesale and Department Store Union AFL-CIO. Cases 10-CA-16763 and 10-RC-12296

June 21, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND ZIMMERMAN

On October 19, 1981, Administrative Law Judge Lawrence W. Cullen issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief to Respondent's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Corn Brothers, Inc., Birmingham, Alabama, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

IT IS FURTHER ORDERED that the proceeding in Case 10-RC-12296 be, and it hereby is, remanded to the Regional Director for Region 10 to open and count the ballots of Cecil Montgomery, Forbus Lee Russell, Jr., and Randy A. Whitten and to prepare a revised tally of ballots, including therein the count of such ballots, upon the basis of which he shall issue the appropriate certification.

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] We disagree with the Administrative Law Judge's conclusion that "knowledge of the union activities of all three discriminatees may be inferred and imputed to Respondent on the basis of the small plant rule." There is no evidence that any in plant organizing took place. To the contrary there is evidence that an effort was made to conceal organizing activities from Respondent by making all contacts away from work.

However, we find that Respondent became aware of the organizing activity through a conversation between Supervisor Billy Gilliam and employees Russell and Whitten on December 1, 1980. Although Russell raised the issue of unionization with Gilliam in only general terms, it is clear from the force with which Gilliam reacted to his remark that it conveyed to him that a union campaign at Corn Brothers was in progress or imminent.

DECISION

STATEMENT OF THE CASE

LAWRENCE W. CULLEN, Administrative Law Judge: This case was heard before me on July 13, 1981, in Birmingham, Alabama.[1] The hearing was held pursuant to a complaint issued and consolidated with an election challenge proceeding by the Regional Director for Region 10 of the National Labor Relations Board on April 14, 1981. The complaint is based on charges filed by Randy A. Whitten, an individual, on behalf of himself and Cecil Montgomery, and Forbus Lee Russell, Jr., individuals. The complaint alleges violations of Section 8(a)(3) and (1) of the Act by Corn Brothers, Inc. (hereinafter referred to as Respondent), and was joined by the answer of Respondent wherein it denied the commission of the alleged unfair labor practices.

The election proceeding involved in this hearing arises from the challenges of the ballots of the three alleged discriminatees (Whitten, Montgomery, and Russell) at a consent election involving Retail, Wholesale and Department Store Union, AFL-CIO (hereinafter referred to as the Union), conducted on February 25, 1981. The three ballots were challenged by the Board agent because their names did not appear on the voter eligibility list. Since the layoffs of Whitten, Montgomery, and Russell are the subject of the above alleged unfair labor practices, the cases were consolidated on the ground that they have substantial and material factual issues which may appropriately be resolved by record testimony at a hearing.

Upon the entire record in this proceeding, including my observations of the witnesses who testified herein, and after due consideration of the briefs filed by counsels for the General Counsel and Respondent, I make the following:

FINDINGS OF FACT AND CONCLUSIONS

I. JURISDICTION

Respondent admits, and I find, that it is a Delaware corporation engaged in the operation of a distribution facility for automotive oil and related products and has an office and place of business located in Birmingham, Alabama. Respondent admits, and I find, that during the past calendar year, which period is representative of all times material herein, it sold and shipped from its Birmingham, Alabama, facility products valued in excess of $50,000 directly to customers located outside the State of Alabama. Respondent admits, and I find, that it is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

[1] All dates are in 1980, unless otherwise stated.

II. THE STATUS OF THE LABOR ORGANIZATION

Respondent admits, and I find, that the Union is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Respondent is a wholly owned subsidiary of Quaker State Oil Refining Corporation. Respondent has its headquarters in Atlanta, Georgia, and operates several divisions including one in Birmingham, Alabama. Respondent's chief operating officer is Homer Ellenburg who was its president at the time of the hearing and an executive vice president in 1980. Marshall Snow is the branch manager of the Birmingham division and has overall responsibility for the Birmingham facility with primary emphasis on sales. Mike Canning is the Birmingham division operations manager and has responsibility for warehouse operations and counter sales. Billy Gilliam was described by Snow as the "dock foreman or loading clerk" and by discriminatees as warehouse manager.

I find that Ellenburg, Snow, and Canning were supervisors within the meaning of Section 2(11) of the Act at all relevant times herein as demonstrated by the undisputed evidence at the hearing of their ability to hire and fire and overall responsibility for the management and supervision of employees. Moreover, Respondent stipulated to the supervisory status of Canning at the hearing. Respondent denies the allegation in the complaint that Gilliam was a supervisor within the meaning of Section 2(11) of the Act. However, it is undisputed that Gilliam is a salaried (as opposed to hourly paid employee) and does not punch a timeclock as other employees do. Discriminatee Whitten testified that Snow referred to Gilliam as the warehouse manager on Whitten's first day of employment. Employees Montgomery, Russell, and Whitten testified concerning Gilliam's authority (and exercise thereof) to grant time off, to direct the employees, and to assign work. Whitten and Montgomery testified that Gilliam reported to them that he had discharged an employee on one occasion. Whitten testified that, on one occasion Gilliam told an employee to punch the clock and go home if he did not want to work. Whitten and Montgomery testified that, on one occasion when they were late returning from a break, Gilliam told them that if they were late returning from a break again, they could punch out and go home. Canning and Snow testified to the effect that Gilliam had no authority to recommend disciplinary action but that his comments would be listened to. Gilliam did not testify. I credit the testimony of Montgomery, Russell, and Whitten concerning the indicia of supervisory authority by Gilliam as outlined above, which is largely unrebutted. Accordingly, I find that Gilliam was a supervisor within the meaning of Section 2(11) of the Act at all relevant times herein. See *Dennis C. Ehrhardt d/b/a Americraft Manufacturing Company*, 242 NLRB 1312 (1979).

It is undisputed that Montgomery, Russell, and Whitten were hired by Canning on September 15, 1980. Whitten was hired to work in the parts department. Montgomery and Russell were hired as truckdrivers. All three employees were hired as probationary employees and were scheduled to become permanent employees upon successful completion of a 90-day probationary period. They testified that they were told by Canning at their time of hire that the Birmingham division had never had a layoff for lack of work and were assured of steady employment if they were willing to work.

In late November and early December, Respondent conducted its annual evaluation of all of its employees including the three discriminatees. All three employees were told by Canning that Respondent was pleased with their performance and were either given raises or told they would be given raises the first of January. Whitten testified he was given his probationary evaluation by Canning and was told he had successfully completed his probation in early December prior to the December 15 official end of his probationary period. He testified that uniforms were ordered for him (which were reserved for permanent employees) and he was placed under Respondent's health insurance program.

Montgomery, Russell, and Whitten testified that there was no shortage of work. Montgomery testified that he asked Canning for overtime about the first week of December and was told he would be assigned overtime to enable him to increase his earnings prior to the holiday season. Snow testified that Canning was new in the job and would not have been familiar with whether there had been prior layoffs. Canning testified that he did not recall discussing layoffs with Montgomery, Russell, and Whitten. Respondent's records show that there had been no prior layoffs of drivers at the Birmingham facility in the past 9 years. Snow and Canning also testified that on occasion employees were given health insurance coverage prior to the completion of their probationary periods as an extra incentive in lieu of a raise to retain them and also on the basis of need. Canning testified that he did not recall a discussion with Whitten concerning the completion of his probationaay period.

I credit the specific testimony of Montgomery, Russell, and Whitten over the testimony of Canning concerning Canning's representations to them that there would be no layoffs. I credit Whitten's testimony over Canning's testimony and I find that Canning had told Whitten in early December that he had successfully completed his probationary period. Whitten's testimony is supported in part by the assignment of uniforms which were normally reserved for permanent employees and by his enrollment in the insurance program. I credit the unrebutted testimony of Montgomery, Russell, and Whitten concerning positive evaluations they had received from Canning in early December and the raises given to Montgomery and Russell. I also credit the unrebutted testimony of Montgomery, Russell, and Whitten that there was no shortage of work. I found Montgomery, Russell, and Whitten to be credible witnesses who had specific recall of the events.

Russell and Whitten testified that approximately the first of December they were commencing work after a break and were discussing the fact that Quaker State Oil Refineries (the parent company) was unionized whereas

Respondent was not. They were approaching Gilliam, and Russell asked him why Quaker State Oil Refineries was unionized whereas Respondent was not. Whitten testified that Gilliam told them that there had been a prior attempt to unionize Respondent by the truckdrivers who had struck 1 day and that "Jack Corn came over here from Atlanta and gave them a little bit more money. And then he (Gilliam) told me he (Corn) picked them off one by one until he had got rid of all of them." Whitten testified that Gilliam then said, "Don't try to get a union in or they'll fire you." Russell testified concerning this conversation that Gilliam said, "Jack Corn will close the doors if there is a union brought in." Gilliam did not testify and the testimony of Russell and Whitten was not rebutted by Respondent. I credit the testimony of both Russell and Whitten concerning Gilliam's statements to them. Although they each recalled different statements having been made by Gilliam, I find their recall of separate statements by Gilliam as parts of the overall discussion to be mutually corroborative concerning Respondent's union animus as expressed by Gilliam. I credit their testimony that Gilliam made each of the statements attributed to him. Corn is Respondent's general manager.

Whitten also testified that Gilliam offered him a ride home that day and on the way home Gilliam told him, "About what you were talking about earlier in the day about the union, I'm serious, Jack Corn will close the plant down and you'll lose your job." I credit the unrebutted testimony of Whitten concerning Gilliam's statement on this occasion.

Whitten testified that he contacted the National Labor Relations Board office and was informed by a Board representative of "our rights; that we could either join an existing union or start our own independent union." Whitten "decided it would be better to join an existing union . . ." and contacted Henry Jenkins, International representative for the Union, on December 9. Jenkins set a meeting for December 13, the following Saturday, with the employees of Respondent to discuss union organization of Respondent. The meeting was attended by 9 or 10 employees (warehouse employees and truckdrivers) including Montgomery, Russell, and Whitten. Respondent then employed approximately 10 or 11 warehouse employees and truckdrivers. According to Jenkins, all the employees at the meeting signed union authorization cards. Jenkins testified that prior to obtaining the cards at the meeting he related an incident concerning a prior attempt by the Union to organize Respondent wherein Respondent had allegedly terminated the employees shortly thereafter. Concern was expressed about the advisability of the Union contacting Respondent prior to the completion of the probationary periods of Montgomery, Russell, and Whitten, although Whitten was certain he had successfully completed his probation. It was decided at the meeting that Jenkins would wait until Tuesday, December 16, to request recognition of the Union in order that the employees could be certain their probationary period had been completed. Montgomery, Russell, and Whitten testified they discussed the Union with other employees and participated in union meetings. Montgomery testified he distributed union cards to two employees who did not attend the meeting. I credit the above unrebutted testimony of Jenkins, Montgomery, Russell, and Whitten.

Jenkins testified that he called Respondent on Tuesday, December 16, between 9:30 and 11 and left his office at 11 a.m. to go to a meeting out of town. Jenkins testified that he asked to talk to Snow and identified himself and told Snow he represented the Union and that a majority of Respondent's employees (at the Birmingham division) "had joined the Union," and Jenkins requested that Respondent commence bargaining at that time and that Snow told him, "You are talking to the wrong one." Jenkins asked whom he should talk to, "and he (Snow) said he didn't know, and he hung up, and that was the extent of the conversation." Jenkins was questioned on cross-examination concerning the Union's petition for certification, which indicates a request for recognition was made on December 16. Jenkins testified that he filled out the petition December 16. The petition was mailed and bears a filing date of "12-29-80" (the date of receipt). Respondent contends that the late receipt of the petition is evidence that Jenkins did not call Snow on December 16.

Montgomery and Whitten testified that on Tuesday, December 16, at approximately 2:30 p.m., they were called into Snow's office and Snow told them he hated to do it so close to Christmas but would have to lay them off. Montgomery testified that he inquired why only he and Whitten were affected and that Snow stated Russell was gone for the day but would also be laid off when he returned to work. Montgomery also testified that he inquired whether they were laid off or fired and Snow told them they were laid off but could not tell them whether they would be recalled. Russell testified that the next morning he reported to work and was told by Gilliam to report to Snow. Russell testified that Snow told him "he hated to lay me off so near Christmas but because of lack of work he was going to have to lay me off." Russell testified that he replied, "Mr. Snow, you can't tell me there's a lack of business when out of the past ten days, I've worked three or four days overtime,"[2] and that Snow then said, "This is not from me, this is from the home office." Russell testified that, in response to his question, Snow told him he was laid off rather than fired and would be reemployed the end of February or the first of March. Snow testified that he did not mention recall or reemployment in his conversation with Montgomery, Russell, and Whitten and did not recall whether Russell had brought up the subject but did not otherwise rebut the testimony of Montgomery, Russell, and Whitten concerning what took place at the time of their terminations. I credit the testimony of Montgomery, Russell, and Whitten as set out in this paragraph. I found their testimony specific and convincing, and largely unrebutted by Snow.

Respondent contends that it had no knowledge of a union organizational campaign at the time of the layoffs of Montgomery, Russell, and Whitten. Respondent asserts an economic defense. Initially, Snow denies that he

[2] It was developed through cross-examination that Russell was referring to overtime on specific days for which he was given compensating time off but did not refer to more than a 40-hour week.

was called by Jenkins on Tuesday, December 16, but rather contends he received this call on Friday, December 19. Snow testified he was called by Ellenburg on Monday, December 15, and that Ellenburg "mentioned the reports that he had, showed that we were in a declining business profit situation and that we needed to take some action" and that Ellenburg "*suggested* that we lay off some people, and he *suggested* the last three people that were hired should naturally be the ones that we should let go." (Emphasis supplied.) Snow testified that Canning was on vacation that week and that his own workload was heavier as a result. He testified that he did not take the action recommended by Ellenburg immediately as, "Well, I was pretty pressed for time, I mean, a matter of a day or two wouldn't make any difference, I didn't think." Snow testified he then left the office at 9 or 10 a.m. that day (Monday, December 15) and went to Gadsden, Alabama, to pick up a new salesman (Nelson Wright). He testified that they "ate lunch, and made a call, and drove back to Birmingham. I got back sometime in the early afternoon." Snow testified that he left the office at 7 a.m. on Tuesday and met Wright in Gadsden again to work in Gadsden. As "I meant to work the entire day in Gadsden with Nelson Wright . . . ." He testified that he met Wright at Beaver Chemical Company, a subsidiary of Respondent, and that General Manager Jack Corn was present and they engaged in discussions until 11 a.m., when they went to lunch. Snow testified that he returned to his office in Birmingham at 3 or 3:30 p.m. that day and then talked to Montgomery and Whitten. Snow identified his expense account (Resp. Exh. 5) and that of Corn (Resp. Exh. 6) for the workweek of December 15 through 19. As pointed out by the General Counsel, a review of Snow's expense account shows that the dates were marked over and changed from the workweek of December 22 through 26 to the workweek of December 15 through 19. Snow's expense account purports to show trips to Gadsden on December 15, 16, and 18. Corn's expense account shows a trip to Gadsden on December 16. However, neither expense account makes any reference to the time spent by Snow in Gadsden or whether he was in Birmingham for any length of time on December 15 or 16.

Snow testified that he did not receive a telephone call from Jenkins until Friday, December 19. He testified that he heard a rumor of a union organizational campaign on Wednesday morning (December 17) but prior to that he had no knowledge of union organizational activities. Snow testified that after he heard this rumor, "I called Mr. Ellenburg and told him it looked like we were having a little problem" and, "Well, any time it looks like you're going to be organized, it's a problem." He testified that it was Respondent's policy to be opposed to union organization of its employees. He testified that he received a telephone call from Jenkins on Friday, December 19, and immediately called Ellenburg and told him that he had been contacted by a labor organization.

Jack Corn did not testify. Salesman Nelson Wright testified that he recalled meeting with Snow in Gadsden (where Wright resides) on Monday, December 15, at the Beaver subsidiary location at midmorning, which was his first day of employment with Corn Brothers; that he met with Snow in Gadsden on Tuesday, December 16, at the same location between 8:30 and 9 a.m.; and that he and Snow spent the morning talking with Jack Shields (the manager of the Beaver subsidiary in Gadsden) and Jack Corn, and then they went to lunch and later made a call on a customer until about 2:30 p.m. Snow then left for Birmingham to return to Corn Brothers and he (Wright) stayed in Gadsden. Wright's expense account for the workweek of December 15 through 19 was not introduced by Respondent at the hearing. Wright was unable to recall whether Snow was in Gadsden any other times during the workweek of December 15 through 19 or the following week.

Respondent's president, Ellenburg, testified that Respondent had experienced growth during the 1970's but as a result of economic conditions (the inflation rate on petroleum products, declines in mileage driven by the average motorist, and improved technology which decreased the amount of oil used) the market in 1980 became "flat" and "we see no change in the forseeable future." Ellenburg sent a letter to the branch managers in January 1980 (Resp. Exh. 11) outlining the need to control operating costs and that no new employees should "be added without approval from the Executive Committee." Ellenburg testified that "by June our overall corporate figures were showing that we were operating with less people and we were making a profit" but that the consolidated report did not show what the individual divisions were doing. Ellenburg testified that consequently, "I asked our payroll department to give me, at the end of each month, beginning in June, a spread sheet showing each division, each job classification, the number of people for '79 versus the number of people in '80, plus the dollars paid out" in order that I could "monitor how many people we had versus last year and whether they were working overtime by dollars paid out."

Ellenburg identified (Resp. Exh. 12) a series of 1979 and 1980 reports comparing gallons sold of oil and oil related products and the gross sales dollars generated by those sales by division. These reports show a substantial decrease in the gallons sold in 1980 from those sold in 1979 but a higher sales volume. Respondent's Exhibit 13 is the profit and loss statement for the Birmingham division and shows a comparison of the monthly and accumulated year to date results for 1980 and 1979. This exhibit shows that in April 1980 the Birmingham division incurred a loss of $6,369 in the category "Net Profit From Operations" and, after an adjustment for depreciation, a loss of $10,185 in the category "Net Profit Before Other Income" and that in November 1980 the Birmingham division incurred a loss of $7,653 in the category "Net Profit From Operations" and after an adjustment for depreciation a loss of $10,860 in "Net Profit Before Other Income." Ellenburg testified that he received the "preliminary profit figures on Friday (December 12)" for Birmingham which indicated an $11,000 loss and a decrease of $30,000 to $40,000 in profits from the

preceding year.[3] Ellenburg testified that he reviewed the "spread sheet" on personnel and reviewed the information over the weekend but was unable to determine the reason and that on Monday morning (December 15) he went to the personnel department and determined that there were three probationary employees subject for review who should not have been hired. Ellenburg testified that he had not made the decision to terminate the employees earlier as, "Well, I was not aware that we had these three individuals and when he had the drastic loss there after the trend, I dug further, and I could see the reason immediately; that our operating expenses were up, volume down, and we couldn't make a profit in the forseeable future if we didn't reduce overhead." Ellenburg testified that he telephoned Snow on Monday morning and, "I told him that we'd lost $10,000 or $11,000 in November; that I was concerned that the trend had continued with declining profits. And furthermore, I have found that we got three people that are probationary employees that we just hired that we don't need. And I said you need to *immediately terminate* them . . . ." (Emphasis supplied.) Ellenburg placed the time of his call at 9 or 9:30 a.m. (Atlanta time) to Snow (which would be 8 to 8:30 a.m. in Birmingham). Ellenburg testified that it was his decision to lay off the three probationary employees and that he confirmed his decision by memo to Snow (G.C. Exh. 3) because he felt it was important. Ellenburg testified that he initially became aware of union activity at the Birmingham division on Wednesday or Thursday (December 17 or 18) when Snow told him "the rumormill was that some people were mentioning union," and he (Ellenburg) considered it to be a reaction to the layoff of the three employees and "discounted" the rumor. Ellenburg testified that on Friday morning he received a telephone call from Snow who told him that a union organizer had called and stated that a majority of the "employees had signed union cards and he wanted to come over and negotiate a contract." Ellenburg testified that he immediately placed a call to Don Smith, the manager of industrial relations for Quaker State Oil Refineries Corporation (the parent company), and sought his guidance. Ellenburg testified on cross-examination that he told Snow that "on the 15th [the date of his call to Snow] their 90-day probationary period was up and we should go ahead and do this without delay." Ellenburg testified he did not discuss with Snow whether other employees should be laid off at the Birmingham facility. Industrial Relations Manager Don Smith testified that he received a call from Ellenburg on Friday, December 19, and he noted the call on his calendar as "Corn Union Call" (Resp. Exh. 18).

The General Counsel recalled Whitten as a rebuttal witness who testified that on Tuesday, December 16, at 11 a.m. he saw Snow leave his office and that Snow stated he was going to lunch. Whitten did not mention this in his affidavit nor was he questioned concerning this during his prior testimony at the hearing.

[3] The $11,000 loss apparently refers to the "Net Profit Before Other Income" loss of $10,860. There were several months during 1980 when "Net Profit Before Other Income" decreased from the preceding year in the Birmingham division (March 1980—a decrease of $19,938 from March 1979; April 1980—a decrease of $28,069; May 1980—a decrease of $2,543; June 1980—a decrease of $17,257; August 1980—a decrease of $5,452; October 1980—a decrease of $1,640; and November 1980—a decrease of $33,270.)

B. *Analysis*

1. The statements by Gilliam to Montgomery and Whitten

As set out in the statement of facts, I have credited the unrebutted testimony of Montgomery and Whitten concerning the statements made by Gilliam to them.

Gilliam's statements to Montgomery and Whitten (that if they attempted to "get a Union in" they would be discharged and that "Jack Corn will close the doors if there is a union brought in," and later in the day to Whitten that Jack Corn would "close the plant down" and Whitten would lose his job) clearly constituted unlawful threats that economic sanctions would be imposed on employees who engaged in union activity at Respondent's facility and were violative of Section 8(a)(1) of the Act. See *Firmat Manufacturing Corp.*, 255 NLRB 1213 (1981).

2. The layoffs of Montgomery, Russell, and Whitten

Much of the evidence in this case is undisputed. Montgomery, Russell, and Whitten were hired on September 15, 1980, and were scheduled to become permanent employees on the successful completion of a 90-day probationary period. It is undisputed that all three employees received positive evaluations in late November or early December from Canning, that Whitten was enrolled in Respondent's health insurance program, and that uniforms were ordered for him although insurance benefits and uniforms were normally furnished only to permanent employees. The small size of the plant (approximately 18 employees) is also not in dispute.

The unrebutted credited testimony of the discriminatees demonstrated that all three were active union adherents with Whitten initially contacting the Union and arranging for the first meeting of the employees; and that all three discriminatees engaged in discussions with other employees and actively promoted the Union. The unrebutted credited testimony of Jenkins, Montgomery, Russell, and Whitten showed that a decision was made at the initial union meeting that Jenkins would call Respondent on Tuesday and request recognition. I credit Jenkins' testimony that he contacted Snow by telephone between 9:30 and 11 a.m. on Tuesday, December 16, and requested recognition. The late receipt of the petition filed with the Board does not convince me that Jenkins was incorrect. Jenkins' testimony is consistent with the determination at the union meeting of December 13 to call Respondent on Tuesday, December 16. I credit Whitten's testimony concerning Snow's presence at the office at 11 a.m. There was no evidence that the phone call was in issue at the time of Whitten's affidavit. I do not credit the testimony of Snow or Wright that Snow was in Gadsden on Tuesday morning, at the time Jenkins testified he placed the call. I find Respondent had direct knowledge of union activities at its Birmingham facility by at least Tuesday morning on December 16. I also find that Respondent's knowledge of Russell's and Whitten's

interest in the Union may be inferred by reason of their discussion with Respondent's agent, Gilliam, who voiced Respondent's union animus on December 1. I also find that knowledge of the union activities of all three discriminatees may be inferred and imputed to Respondent on the basis of the small plant rule. See *Haynes Industries, Inc.*, 232 NLRB 1092 (1977); *Wiese Plow Welding Co., Inc.*, 123 NLRB 616 (1959). The evidence clearly establishes Respondent's union animus as reflected by Gilliam's threats to Montgomery and Whitten, and Snow's testimony concerning Respondent's opposition to unionization of its Birmingham facility as borne out by Ellenburg's testimony concerning his reaction to union organization of the Birmingham facility.

I find that Montgomery, Russell, and Whitten were engaged in concerted activities protected under Section 7 of the National Labor Relations Act, as amended, when they participated in the Union's organizational campaign. I find that Respondent had knowledge of their activities which knowledge is imputed to Respondent by reason of the discussion of Russell and Whitten with Respondent's agent, Gilliam, and which knowledge concerning the union activities of Montgomery, Russell, and Whitten is inferred to Respondent by the application of the "small plant" rule. I find that Respondent's union animus has been demonstrated. In view of Respondent's knowledge of the union activities engaged in by Montgomery, Russell, and Whitten, and Respondent's union animus and in view of the timing of their discharges by Respondent which occurred without prior warning less than a week after the first union organizational meeting of December 13, I find that the General Counsel has made a *prima facie* case that the discharges were motivated by an unlawful purpose to discourage union activity giving rise to a violation of Section 8(a)(3) of the Act.

Respondent asserts an economic defense and contends that the discharges were the result of a cost reduction effort in response to losses incurred by the Birmingham division in November and an overall policy introduced in early 1980 in order to reduce payroll costs. I find Respondent's economic defense to be inconsistent in several respects. Initially, the evidence clearly shows that Respondent's Birmingham division incurred significant economic losses early in 1980 and continued to hire employees throughout the year including the discriminatees who were hired in September 1980. The Birmingham division hired 17 new employees in 1980, including the discriminatees, following the January letter from Ellenburg concerning the need to clear the replacement of employees with him. Nine of the employees hired were listed as drivers, one as a warehouse-driver employee and two as warehousemen. At least three of these employees were probationary drivers at the time of the occurrence of the substantial loss incurred in April. Yet these employees were not discharged. Rather, Respondent continued to hire additional employees during the months of May, June, July, and September 1980. Ellenburg's focus of attention on Montgomery, Russell, and Whitten on the ground that they were probationary employees appears overemphasized as Ellenburg and Snow both testified that under Respondent's policy employees (permanent, probationary, or temporary) who have been laid off for lack of work have no recall rights. Respondent's actions in granting substantial wage increases to its employees, including the discriminatees within a week or two prior to the layoff of the discriminatees and in January 1981, are inconsistent with reducing payroll costs. Ellenburg's focus on the three discriminatees (whose combined monthly gross earnings as derived from Resp. Exh. 15 did not exceed $2,500) as the cause or cure for a $10,000 deficit without any other evidence of cost reduction efforts by Respondent gives rise to the inference that Respondent's actions in terminating Montgomery, Russell, and Whitten were motivated by their union activities rather than a drive to reduce costs. I also find a glaring inconsistency between Ellenburg's stated urgency in his alleged call to Snow on Monday, December 15, that Montgomery, Russell, and Whitten be terminated immediately on their final day of probation and Snow's testimony that he did not commence the layoffs until Tuesday afternoon because he was pressed for time and did not think the matter of a day or two would make any difference. I do not credit Ellenburg's or Snow's testimony concerning the alleged economic reasons for the layoffs.

I find that Respondent's asserted defense that the layoffs were motivated by economic considerations is pretextual. See *Limestone Apparel Corp.*, 255 NLRB 722 (1981); *Eccomunity Farms, Inc., d/b/a Mountain Meats*, 236 NLRB 1481 (1978). However, assuming, *arguendo*, that Respondent was motivated in part by economic considerations in discharging the discriminatees, I find that Respondent has not demonstrated that the discharges would have occurred in the absence of the discriminatees' protected activities. I find that the General Counsel has made a *prima facie* case that Respondent has violated Section 8(a)(3) and (1) of the Act in discharging Cecil Montgomery, Forbus Lee Russell, Jr., and Randy A. Whitten and that Respondent has failed to rebut the *prima facie* case.[4]

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The unfair labor practices of Respondent, as found herein in connection with Respondent's operations, as found in section I, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing the flow of commerce.

V. THE CHALLENGED BALLOTS

The stipulated appropriate unit is "All employees employed by the Employer at its Birmingham, Alabama, facility; but excluding all office clerical employees, salespersons, guards and supervisors as defined in the Act." The challenged ballots of Montgomery, Russell, and Whitten are sufficient in number to affect the results of the election held on February 25, 1981.[5]

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[4] See *Wright Line, a Division of Wright Line Inc.*, 251 NLRB 1083 (1980).

[5] The tally of ballots showed that, of 13 eligible voters, 5 cast valid votes for and 5 cast valid votes against the Petitioner Union and the 3 ballots cast by the discriminatees were challenged. No objections to the election were filed.

As I have found, Montgomery, Russell, and Whitten were discriminatorily discharged in violation of Section 8(a)(3) and (1) of the Act, I find they were eligible to vote in the election on February 25, 1981. Accordingly, I shall recommend the challenges to their ballots be overruled. See *Gossen Company, a Division of the United States Gypsum Company*, 254 NLRB 339 (1981); *PRS Limited, d/b/a F. & M. Importing Co.*, 237 NLRB 628, 632 (1978); and *Firmat Manufacturing Corp., supra.*

In accordance with the foregoing findings and recommendation, I shall further recommend that the representation proceeding be remanded to the Regional Director with the direction to open and count the ballots of Montgomery, Russell, and Whitten, to prepare a revised tally and to issue the appropriate certification.

CONCLUSIONS OF LAW

1. Respondent Corn Brothers, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Retail, Wholesale and Department Store Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By threatening its employees with discharge or loss of jobs or a shutdown of its operations and facilities at its Birmingham, Alabama, division if they engaged in union activities, Respondent has violated Section 8(a)(1) of the Act.

4. By discharging and thereafter failing and refusing to reinstate its employees Cecil Montgomery, Forbus Lee Russell, Jr., and Randy A. Whitten, Respondent has violated Section 8(a)(3) and (1) of the Act.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

6. Cecil Montgomery, Forbus Lee Russell, Jr., and Randy A. Whitten were eligible voters at the time of the consent election held on February 25, 1981, and their ballots should be counted in determining the outcome of the election.

THE REMEDY

Having found that Respondent has committed acts in violation of Section 8(a)(1) and (3) of the Act, it shall be ordered to cease and desist therefrom and from any other unlawful activity and to take certain affirmative action designed to effectuate the policies of the Act. Accordingly, I recommend that Respondent be required to post the appropriate informational notice to employees in appropriate places at its Birmingham, Alabama, facility, and I recommend the reinstatement of Cecil Montgomery, Forbus Lee Russell, Jr., and Randy A. Whitten and that Respondent make them whole for losses due to discrimination against them and cease and desist from any other unfair labor practices. All loss of earnings and other benefits due under this order shall be computed with interest in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977). See, generally, *Isis Plumbing & Heating, Co.*, 138 NLRB 716 (1962).

Upon the foregoing findings of fact, conclusions of law, upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[6]

The Respondent, Corn Brothers, Inc., Birmingham, Alabama, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Threatening its employees with discharge or loss of jobs or a shutdown of its operations and facilities at its Birmingham, Alabama, division in order to discourage their support of Retail, Wholesale and Department Store Union, AFL-CIO, or any other labor organization.

(b) Discouraging membership in a labor organization by discharging or refusing to reinstate or otherwise discriminating against employees in their hire and tenure.

(c) In any other manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them under Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the purposes and policies of the Act:

(a) Offer to Cecil Montgomery, Forbus Lee Russell, Jr., and Randy A. Whitten immediate and full reinstatement to their former positions or, if those positions are no longer available, to substantially equivalent positions without prejudice to their seniority and other rights and privileges previously enjoyed.

(b) Make the employees named above in section (a) whole for any loss of pay or any other benefits they have sustained by reason of the discrimination practiced against them in the manner set forth in this Decision entitled "The Remedy."

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post on all bulletin boards at the Birmingham, Alabama, division of Corn Brothers, Inc., copies of the attached notice marked "Appendix"[7] on forms provided by the Regional Director for Region 10, after being duly signed by Respondent representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

[6] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[7] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(e) Notify the Regional Director for Region 10, in writing, within 20 days from the date of the Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that Case 10–RC–12296 be remanded to the Regional Director with a direction to overrule the challenges to the ballots of Cecil Montgomery, Forbus Lee Russell, Jr., and Randy A. Whitten and to open and count their ballots and to prepare a revised tally of ballots and issue the appropriate certification.